(1)

91-640

No. _____

In The

Supreme Court of the United States

October Term, 1991

PIZZACO OF NEBRASKA, INC., d/b/a DOMINOS PIZZA AND DOMINOS PIZZA, INC.,

Petitioners,

v.

LANGSTON BRADLEY AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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October 15, 1991

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QUESTIONS PRESENTED

1. Whether a prima facie case of disparate impact in Title VII cases may be established without any showing that the challenged practice had any adverse impact on employment opportunities for those in a protected category?

2. Whether the existence of an employer's no-beard policy for food delivery persons constitutes a violation of Title VII based upon a disparate impact theory absent a showing that at least one employee in a protected category has been adversely affected in the employment relationship?

3. Whether a prima facie case of disparate treatment under Title VII can be made solely on a presumption of adverse effect?

LIST OF PARTIES

The parties to the proceedings below were the petitioners Pizzaco of Nebraska, Inc.,[1] d/b/a Domino's Pizza and Dominos Pizza, Inc.,[2] and the respondents, Equal Employment Opportunity Commission and Langston Bradley.

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[1] Petitioner Pizzaco of Nebraska, Inc. has no parent corporation or subsidiaries.

[2] Petitioner Domino's Pizza, Inc. has no parent corporation or subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

The petitioners, Pizzaco of Nebraska, Inc. and Domino's Pizza, Inc. respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled proceeding on July 25, 1991.

OPINIONS BELOW

The Opinions of the Court of Appeals for the Eighth Circuit have not been reported. They are printed in the appendix hereto, p.1a, infra.

The Findings of Fact and Judgment of the United States District Court for the District of Nebraska (Cambridge, J.) have not been reported. They are reprinted in the appendix hereto, p. a16, infra.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 2000(e)-5(f), and 28 U.S.C. 1343(3) and (4), respondent, Langston Bradley brought this action in the United States District Court for the District of Nebraska, and the respondent Equal Employment Opportunity Commission intervened. On May 26, 1989, the District Court announced its findings of fact and on May 31, 1989, judgment dismissing the action with prejudice was entered. See page a16, infra.

On respondent's appeals, the Eighth Circuit entered an opinion affirming the dismissal of Bradley's complaint and reversing the District Court's judgment as to EEOC's complaint and remanding the matter to District Court on February 21, 1991. Petitioner's timely petition for rehearing was denied but a substitute opinion was entered by the Circuit Court on July 25, 1991.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

42 U.S.C. 2000(e)-2(a) provides:

a. It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privilege of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status of an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. 2000(e)-2 is printed in full at page a30, infra.

STATEMENT OF THE CASE

Respondent Langston Bradley is a black male who was employed by Petitioner Pizzaco of Nebraska, Inc., as a part-time delivery person on September 4, 1984. He was terminated on September 17, 1984 for failure to comply with the no-beard policy of the employer. Bradley contends that he suffers from a condition known as pseudofolliculitis barbae (commonly referred to as PFB) which is a chronic skin disorder resulting from sharp tips of

recently shaved facial hair penetrating the skin and causing an inflammatory reaction which can result in scarring and other disfigurement. The condition is claimed to affect black males predominantly and not to affect whites in any significant degree. Bradley claimed that the maintenance of the no-beard policy by his employer constituted an employment practice which resulted in a disparate impact upon black males and was therefore discriminatory.

No evidence was introduced to show the make-up of petitioners work force, or the characteristics of the qualified persons in the labor market. The respondent offered some evidence, consisting of studies conducted of certain groups of military personnel and of patients in one expert's private practice during a period of 10 weeks. The District Court refused to admit this evidence for the reason that no adequate foundation had been laid and that the samples were extremely small.

No evidence that petitioner had ever denied employment to any black person was offered. No evidence that any one other than respondent Bradley had ever been discharged for refusal to comply with the no-beard policy was offered. The evidence did show that respondent Bradley could and did present a clean shaven appearance for an extended period without aggravating his condition.

The District Court dismissed respondents case at the conclusion of a 3-1/2 day trial.

On appeal, in a decision filed on February 21, 1991, the Circuit Court held that statistical evidence was not necessary to establish a prima facie disparate impact case

under Title VII; that medical testimony and studies, and expert medical testimony was sufficient when the disparity under attack has its roots in a medical condition peculiar to a protected group.

The respondent's experts had testified that as many as 45 percent of black males have PFB and approximately 25 percent cannot shave because of PFB. The expert testified that his opinions extended to the entire national population of black males.

The Circuit Court then determined that the evidence before the District Court was sufficient to establish a prima facie case for the respondent E.E.O.C., remanded the matter for the business justification phase of the case and affirmed the District Court's dissmissal of respondent Bradley's complaint.

Respondent petitioned for Rehearing En Banc which was denied on July 24, 1991, however the Circuit Court of Appeals filed a substituted decision on July 25, 1991. It is from the second decision that the Respondent petitions for Certiorari.

REASONS FOR GRANTING THE WRIT

THE CIRCUIT COURT OF APPEALS DECISION IS IN DIRECT CONFLICT WITH THE DECISION OF THIS COURT IN *WARDS COVE PACKING CO., INC. V. ANTONIO,* 490 U.S. 642 (1989).

This case presents an important question of law in an area in which this Court has rendered opinions, which taken together, have developed the appropriate rules in cases where employment discrimination resulting from

disparate impact is alleged. *Connecticut v. Teal*, 457 U.S. 440 (1982); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988); *Wards Cove Packing Co., Inc. v. Antonio*, 490 U.S. 642 (1989). The Circuit Court, however, has not followed these developments and appears to have reached a decision in direct conflict with *Wards Cove*.

The Employers do not contest the Circuit Court's findings that pseudofolliculitis barbae is a skin condition which makes it difficult for the person who has it to appear clean shaven and that the condition primarily affects black males while white males are generally unaffected by it. It is conceded that in some circumstances it is conceivable that the no-beard policy could result in a black male either being denied employment or being discharged because of his inability to maintain a clean shaven appearance. There is, however, nothing in the record of this case to show that, in fact, any such circumstances have occurred or such a result has taken place.

The plaintiff employee does suffer from PFB, but not to the extent that he cannot maintain a clean shaven appearance.

Intervenor EEOC stands in even worse condition regarding the making of a prima facie case.

The record in this case shows that Domino's Pizza had more than 100,000 driver/delivery employees delivering pizza to customers at home locations. Other than the named plaintiff, whose case was dismissed, there is no indication that any delivery driver of the Domino's corporation was ever refused employment or discharged from employment because of the no-beard rule.

The burden is upon the plaintiff to make a prima facie case of employment discrimination. Plaintiff and EEOC contend that the no-beard rule has a disparate impact upon black males. They failed, however, to show any such impact or effect upon the employer's work force. In order for them to be successful, it would seem to be necessary to show, at the least, a disproportion of black males in Dominos work force as compared to the proportion of black males in the labor market. There is no showing of either. There is not even a showing of the make up of the relevant labor market.

The Circuit Court's reliance upon *Dothard v. Rawlinson*, 433 U.S. 321 (1977) is misplaced. In that case, the make up of the work force was known, the make up of the national population was known, in this case, there is no indication of the number, if any, of black males who have PFB working for Dominos, or how many, if any, of them can comply with the no-beard rule. In that case, it was known that at least one female had suffered adverse action because of the rule. In this case, only the plaintiff Bradley claims to have been affected and the trail court found that although he did have PFB, he could have appeared clean shaven, but elected not to do so. The adverse action as to his employment was not a result of his condition, but was solely the result of his choice not to shave.

If there was, in fact, disparate impact, plaintiff EEOC could have made the necessary showings.

As realistically pointed out in *Wards Cove*, " . . . liberal civil discovery rules give plaintiffs broad access to employers' records in order to document their claims."

Wards Cove v. Antonio, 490 U.S. at 657. Nevertheless, no evidence was introduced by the EEOC to show any individual with PFB affected by the rule.

Putting it quite simply, there can be no disparate impact without a showing of some disparate impact.

There is nothing in the record to indicate that there has been any "disparate impact" in the sense that any individual in a protected minority category has suffered any employment harm. Nor unlike the situation in *Dothard* are we certain that any persons exist in the work force who have PFB.

As a result, and notwithstanding the Circuit Court's reference to *Dothard,* we suggest that the ruling of *Wards Cove* requires much more to make a prima facie case.

As stated in *Wards Cove,* even though a petitioner,

> . . . can show that nonwhites are under represented in the at issue jobs . . . this alone will *not* suffice to make out a prima facie case of disparate impact. Respondents will also have to demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking here, specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites.

The opinion states that:

> To hold otherwise would result in employers being potentially liable for "the myriad of innocent causes which may lead to the statistical imbalances in the composition of their work forces." *Watson v. Fort Worth Bank & Trust,* [487 U.S. 977, 108 S.Ct. at 2787.]

490 U.S. at 657.

This clearly states the problem with the panel's decision.

One lesson of *Wards Cove* as applied to this case is that plaintiff must show that general population statistics are representative. The holding of the panel requires the defendant/employer to show the statistics are not representative.

The Court has remanded this case to the district court for the determination of business justification under the guidelines established in *Wards Cove.* As was stated in *Wards Cove,* in order for a petitioner to establish a prima facie case, it is necessary to demonstrate that "specific elements of the petitioner's hiring process have a significantly disparate impact on nonwhites." All that has been established here is that black males have the skin condition of PFB and for the most part, white males do not. As indicated previously, the individual plaintiff here had PFB but was able to appear clean shaven and comply with the rule of the employer.

Nor is there any concept of "chilling" in the record. (Chilling being the term used to indicate that an employer's policy is well-known to persons in a protected category so that those persons do not bother to apply for work.) Only Bradley was brought to the attention of the court even though a national and broad reaching injunction was sought by the EEOC which would affect more than 100,000 employees of Domino's. As mentioned previously in *Wards Cove,* this court held that "liberal civil discovery rules give plaintiffs broad access to employers' records in an effort to document their claims." (490 U.S. at 657). This clearly indicates the

requirement that plaintiffs show a causal relationship of the rule of practice to a disparity in the work force.

Not only was no evidence of any chilling effect offered, no evidence that any black employees lost their jobs – other than Bradley – because of the fact that they were required by their physical skin condition to grow beards was proffered.

It is not enough to assert that bottom line racial balance is not a defense under Title VII and thus no such statistical analysis or showing is or should be required. *Connecticut v. Teal*, 457 U.S. 440 (1982).

> As pointed out in footnote 8 of *Wards Cove*, " . . . even if petitioners could show that the percentage of selected applicants who are nonwhite is not significantly less than the percentage of qualified applicants who are nonwhite, respondents would still have a case under Title VII, if they could prove that some particular hiring practice has a disparate impact on minorities, notwithstanding the bottom line racial balance in petitioners workforce."

It is clear that there must be some proof that the employer's particular practice has a disparate impact on minorities. In this case, the only practice or policy of the employer that was attacked or examined was the no-beard policy. The only evidence of its impact consisted of expert opinions to the effect that as many as 45 percent of black males suffer from PFB while virtually no white males are so affected. Further, the evidence indicated that only half of the people suffering from PFB are or might be unable to maintain a clean shaven appearance. Implicit in that assertion and analysis is an assumption that black

males can be properly considered to be a minority group. Such assumption virtually requires that only males be considered eligible or qualified for employment as delivery drivers. Of course, such an assumption could result in unlawful discrimination against females.

In the case now before the Court, nothing is known about the population of the employer with reference to any kind of adverse impact that the company's rule may have had now or at any time previous and, therefore, it is clear under the rule of *Wards Cove* that much more is needed to make a prima facie case.

Also, the Circuit Court in suggesting that *Dothard* had application to this case, failed to consider the lessons of *Hazelwood School District v. U.S.*, 433 U.S. 299 (1977), as referred by this Court in *Wards Cove* at 490 U.S. 650-51 as follows:

> "There can be no doubt," as there was when a similar mistaken analysis had been undertaken by the courts below in *Hazelwood, supra,* at 308, 97 S.Ct., at 2741, "that the . . . comparison . . . fundamentally misconceived the role of statistics in employment discrimination cases." The "proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified . . . population in the relevant labor market." *Ibid.* It is such a comparison – between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs – that generally forms the proper basis for the initial inquiry in a disparate-impact case. Alternatively, in cases where such labor market statistics will be difficult if not impossible to ascertain, we have recognized that certain other statistics – such as

> measures indicating the racial composition of "otherwise-qualified applicants" for at-issue jobs – are equally probative for this purpose.

Also in *Wards Cove*, this Court indicated 490 U.S. at 652, that it would not be proper to have any employer who had some segment of his work force racially imbalanced to be brought into court for the purpose of defending so-called business necessity. In the case of Domino's, this is one step further back in that there is no showing of racial imbalance.

CONCLUSION

This Court, in a series of decisions has laid down the standards and guide lines for the proper analysis and evaluation of the sufficiency of a prima facie showing of discrimination based upon the disparate impact of a facially neutral employment policy or practice. The Circuit Court has failed to apply or has misunderstood those precedents. It is necessary that the remaining uncertainty be resolved by this Court. The writ of certiorari should issue.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2271NE

Langston Bradley,

Appellant,

Equal Employment Opportunity Commission (Intervenor Below),

v.

Pizzaco of Nebraska, Inc. d/b/a Domino's Pizza, and Domino's Pizza, Inc.,

Appellees.

No. 89-2272NE

Langston Bradley,

Equal Employment Opportunity Commission (Intervenor Below),

Appellant,

v.

Pizzaco of Nebraska, Inc. d/b/a Domino's Pizza, and Domino's Pizza, Inc.,

Appellees.

Appeals from the United States District Court for the District of Nebraska.

Submitted: March 13, 1990
Filed: February 21, 1991

Before FAGG, WOLLMAN, and MAGILL, Circuit Judges.

FAGG, Circuit Judge.

Langston Bradley brought this disparate impact case against Domino's Pizza, Inc. and Pizzaco of Nebraska, Inc. (collectively Domino's) claiming his discharge for failure to comply with Domino's no-beard policy violates Title VII because the policy discriminates against black males. 42 U.S.C. § 2000e-2(a) (1988). The Equal Employment Opportunity Commission (EEOC) intervened seeking injunctive relief on behalf of other black males adversely affected by Domino's no-beard policy. 42 U.S.C. § 2000e-4(g)(6). The district court concluded Bradley and the EEOC failed to establish a prima facie case of disparate impact and dismissed their complaints. The district court also found Bradley could comply with Domino's no-beard policy. Bradley and the EEOC appeal. We affirm in part, reverse in part, and remand for further proceedings.

The controlling facts are not complicated. Domino's grooming policy prohibits store employees from wearing beards. Pizzaco, a Domino's franchisee, hired Bradley as a pizza deliverer, but fired him within two weeks because he would not remove his beard. Pizzaco's owner

explained, "[Y]ou must be cleanshaven to work for Domino's." Bradley is a black man who suffers from pseudofolliculitis barbae (PFB), a genetic skin disorder affecting almost half of all black males. Approximately half of these PFB sufferers have sufficiently severe cases that they must abstain from shaving. The district court, however, found Bradley could shave without complications.

Bradley and the EEOC contend the district court committed error in ruling their evidence was insufficient to prove Domino's no-beard policy has a disparate impact on black males. We agree. To establish a prima facie case of discrimination under the disparate impact theory, Bradley and the EEOC must show a specific employment practice has caused a significantly disparate impact on black males. *See Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2124-25 (1989); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988). Bradley and the EEOC may prove causation with statistical evidence showing Domino's across-the-board no-beard policy excludes black males as a class from employment with Domino's at a substantially higher rate than white males. *See Watson*, 487 U.S. at 994-95; *Green v. Missouri Pac. R.R.*, 523 F.2d 1290, 1293 (8th Cir. 1975); *EEOC v. Trailways, Inc.*, 530 F. Supp. 54, 59 (D.C. Colo. 1981) (PFB case).

We believe Bradley and the EEOC presented a prima facie case of disparate impact. The record shows PFB almost exclusively affects black males. White males, however, rarely suffer from PFB or other skin disorders that make shaving difficult. Medical witnesses for both sides testified that as many as forty-five percent of black males have PFB. A dermatologist called by Bradley and the

EEOC testified that a study he conducted on males in the military showed half of the black males with PFB could not shave. This dermatologist described other studies that produced substantially similar results.

The district court, believing the samples in the dermatologist's study groups were too small, refused to accept Bradley's and the EEOC's statistical evidence. Contrary to the district court's view, however, "[t]here is no minimum sample size prescribed either in federal law or in statistical theory." *MacDissi v. Valmont Indus.*, 856 F.2d 1054, 1058 (8th Cir. 1988). As we view the record, the district court overlooked the dermatologist's unrebutted testimony, admitted without objection, equating his military study group with the black male population at large. Additionally, one of Domino's medical witnesses corroborated the dermatologist's testimony that military samplings of black males fairly represent the general black male population. Thus, Bradley and the EEOC presented statistical studies representative of the general black male population, and their reliance on these statistics to prove a prima facie case of disparate impact was not misplaced. *See Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977); *EEOC v. Rath Packing Co.*, 787 F.2d 318, 336 (8th Cir.), *cert. denied*, 479 U.S. 910 (1986). General population statistics are highly significant where there is no reason to believe the disqualifying characteristic potential job applicants possess differs markedly from the national population.

Bradley's and the EEOC's evidence shows Domino's no-beard policy "has created the disparate impact under attack." *Wards Cove*, 109 S. Ct. at 2124. Their evidence

shows PFB effectively excludes almost twenty-five percent of the potential black male work force from employment with Domino's, and the white male work force is not similarly excluded. This evidence clearly permits the inference "that some black males would be eligible for . . . positions [with Domino's] if they did not suffer from PFB," and "proportionately fewer blacks than whites were eligible for [these] positions" because of Domino's no-beard policy. *EEOC v. Greyhound Lines, Inc.*, 635 F.2d 188, 194 (3d Cir. 1980). Having concluded the district court erroneously discounted Bradley's and the EEOC's statistical proof, we must reverse the district court's holding that a prima facie showing of disparate impact was not made in this case.

Bradley also contends the district court's finding that he can shave is clearly erroneous. We disagree. The testimony was contradictory about the severity of Bradley's PFB and his ability to shave. Nevertheless, the record shows that almost half of the black males with PFB can shave, that Bradley has a mild case of PFB, and that at his next job, Bradley always appeared cleanshaven. Although there is evidence to the contrary, we believe the record supports the district court's finding. *See Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985).

Finally, Bradley contends he is disabled under the Nebraska Fair Employment Practice Act. *See* Neb. Rev. Stat. § 48-1102(8) (Supp. 1989). The district court found Bradley was not disabled by his PFB condition under the terms of the Nebraska statute. Unless the district court's analysis is fundamentally deficient or otherwise lacking in reasoned authority, we defer to the district court on an issue of state law not yet decided by the state courts. *See*

Pershern v. Fiatallis N. Am., Inc., 834 F.2d 136, 138 (8th Cir. 1987). After careful consideration, we accept the district court's application of Nebraska law.

Accordingly, we affirm in part, reverse in part, and remand to the district court to proceed with the business justification stage of this disparate impact case. *See Wards Cove*, 109 S. Ct. at 2125-27.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2271NE
No. 89-2272NE

Langston Bradley, Appellant, Equal Employment Opportunity Commission (Intervenor below), vs. Pizzaco of Nebraska, Inc. d/b/a Domino's Pizza, and Domino's Pizza, Inc., Appellees.	*	Appeal from the United States District Court for the District of Nebraska. (Filed July 24, 1991)

Appellees' petition for rehearing with suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Judge Beam did not participate.

Rehearing by the panel is also denied.

July 24, 1991

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 89-2271NE

Langston Bradley,

Appellant,

Equal Employment Opportunity Commission (Intervenor Below),

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Before FAGG, WOLLMAN, and MAGILL, Circuit Judges.

FAGG, Circuit Judge.

Langston Bradley brought this disparate impact case against Domino's Pizza, Inc. and Pizzaco of Nebraska, Inc. (collectively Domino's) claiming his discharge for failure to comply with Domino's no-beard policy violates Title VII because the policy discriminates against black males. *See* 42 U.S.C. § 2000e-2(a) (1988). The Equal Employment Opportunity Commission (EEOC) intervened on behalf of Bradley and other black males adversely affected by Domino's no-beard policy. *See* 42 U.S.C. § 2000e-4(g)(6). The EEOC seeks an injunction requiring Domino's to recognize an exception to the policy for black men who medically are unable to shave, but does not dispute that Domino's is otherwise free to enforce its policy. The district court concluded "the EEOC . . . failed to establish [Domino's policy has] a disparate impact on black males" and dismissed its complaint. The district court also found Bradley could comply with Domino's no-beard policy and dismissed his complaint. The EEOC and Bradley appeal. We reverse in part, affirm in part, and remand for further proceedings.

The controlling facts are not complicated. Domino's grooming policy prohibits company employees from wearing beards. Pizzaco, a Domino's franchisee, hired

Bradley to deliver pizzas, but fired him within two weeks because he would not remove his beard. Bradley is a black man who suffers from pseudofolliculitis barbae (PFB), a skin disorder affecting almost half of all black males. The symptoms of PFB – skin irritation and scarring – are brought on by shaving, and in severe cases PFB sufferers must abstain from shaving altogether. Domino's policy, however, provides for no exceptions. As Pizzaco's owner explained, "[Y]ou must be clean-shaven to work for Domino's." Although Bradley contended otherwise, the district court found he could shave without complications.

This case, then, is about a facially neutral employment policy that discriminates against black males when applied. Title VII forbids employment policies with a disparate impact unless the policy is justified by legitimate employment goals. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-31 (1971). To make a prima facie case of disparate impact, the EEOC must identify a specific employment practice that has a significantly disparate impact on black males. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-58 (1989). The EEOC contends the district court committed error in holding the EEOC failed to satisfy these requirements. We agree. Through expert medical testimony and studies, the EEOC demonstrated Domino's policy necessarily excludes black males from the company's work force at a substantially higher rate than white males. In so doing, the EEOC has shown Domino's facially neutral grooming requirement operates as a "built-in headwind" for black males. *Griggs*, 401 U.S. at 432.

The record shows PFB almost exclusively affects black males and white males rarely suffer from PFB or comparable skin disorders that may prevent a man from appearing clean-shaven. Dermatologists for both sides testified that as many as forty-five percent of black males have PFB. The EEOC's dermatologist offered his opinion that approximately twenty-five percent of all black males cannot shave because of PFB. The district court, however, rejected the offer of this opinion on the ground the dermatologist was not qualified to testify about PFB's impact on the black male population's ability to shave. The district court committed error. When the disparity under attack has its roots in a medical condition peculiar to a protected racial group, the disqualifying racial condition and its prevalence may be established by expert medical testimony. The record and the dermatologist's resume show he has extensive experience in the field of dermatology, and has conducted studies, written articles, and lectured on the topic of PFB. By holding this medical expert could not testify about the prevalence of a medical condition within his area of expertise, despite his wealth of relevant training, study, and experience, the district court clearly abused its discretion. *See Fox v. Dannenberg*, 906 F.2d 1253, 1256-57 (8th Cir. 1990). Thus, this expert's opinion must be considered as part of the EEOC's prima facie case.

The EEOC's dermatologist also described results from military studies that were in keeping with his opinion that significant numbers of black males with PFB cannot shave. These military studies showed that upwards of fifty percent of black males who shave have PFB and of those twenty percent could not shave. The

district court, believing the number of black males in the military studies was too small for a statistical analysis, refused to consider the studies' results. The EEOC's case, however, rests on medical rather than statistical evidence. The dermatologists for the EEOC and Domino's made clear the medical significance of the military samplings: PFB study results drawn from small military samplings of black men are representative of PFB's prevalence in, and impact on, the general black male population.

In our view, the EEOC was entitled to rely on the military studies and the opinions of the dermatologists equating the studies' results to the black male population to establish a prima facie case of disparate impact. This is particularly true because the disqualifying racial condition affects the black males without regard to geographical, cultural, educational, or socioeconomic considerations. *See Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977) (reliance on general population data is not misplaced when there is no reason to believe the disqualifying racial characteristic of the sampled group differs markedly from the group's counterpart in the national population). If Domino's believed the military studies' results were skewed, or disagreed with the dermatologists' views that the results of military studies of PFB mirror the black male population as a whole, it was "free to adduce countervailing evidence of [its] own." *Id.* at 331. Domino's did not do so. "We will not second-guess the significance of a small sample size where [the employer] has failed to present any evidence of its lack of reliability." *McAlester v. United Air Lines*, 851 F.2d 1249, 1258 (10th Cir. 1988).

The district court also held the EEOC failed to establish a prima facie case of disparate impact because it did

not produce statistical evidence comparing "the racial composition of [Domino's] labor market [with] the racial composition of [Domino's work force]." Disparate impact claims under Title VII, however, do not require a showing of racial disparity at the bottom line of the employer's work force. *Connecticut v. Teal*, 457 U.S. 440, 450-51 (1982). Contrary to the district court's view, a case can be made under Title VII by proving a specific hiring practice has a disparate impact, "notwithstanding the bottom-line racial balance in [the employer's] workforce." *Wards Cove*, 490 U.S. at 653 n.8.

Nevertheless, Domino's contends we must affirm the district court because the EEOC failed to show black males with PFB who could not shave were turned away or were fired for failing to comply with Domino's no-beard policy. We disagree. There is no requirement that disparate impact claims must always include evidence that actual job applicants were turned down for employment because of the challenged discriminatory policy. *Dothard*, 433 U.S. at 330. The reason is self-evident: a discriminatory work policy might distort the job applicant pool by discouraging otherwise qualified workers from applying. *Id.* Thus, a prima facie case can be made on general population figures when the data "conspicuously demonstrates [the] job requirement's grossly discriminatory impact." *Id.* at 331; *see also Wards Cove*, 490 U.S. at 651 n.6.

The EEOC's evidence makes clear that Domino's strictly-enforced no-beard policy has a discriminatory impact on black males. PFB prevents a sizable segment of the black male population from appearing clean-shaven,

but does not similarly affect white males. Domino's policy – which makes no exceptions for black males who medically are unable to shave because of a skin disorder peculiar to their race – effectively operates to exclude these black males from employment with Domino's. Thus, having concluded the EEOC has shown Domino's grooming policy falls more harshly on blacks than it does not whites, we must reverse the district court's holding that the EEOC failed to make a prima facie showing of disparate impact.

For his part, Bradley contends the district court's finding that he can shave is clearly erroneous. We cannot agree. The testimony was contradictory about the severity of Bradley's PFB and his ability to shave. Nevertheless, the record shows that almost half of the black males with PFB can shave, that Bradley has a mild case of PFB, and that at his next job, Bradley always appeared clean-shaven. Based on this record, we cannot say the district court's finding is clearly erroneous. *See Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985).

Bradley also contends he is disabled under the Nebraska Fair Employment Practice Act. *See* Neb. Rev. Stat. §§ 48-1101 to -1126 (1988 & Supp. 1990). The district court decided Bradley is not disabled by his PFB condition under the terms of the Nebraska statute. *See id.* § 48-1102(8). Having reviewed de novo the district court's interpretation of this state law question, *Salve Regina College v. Russell*, 111 S. Ct. 1217, 1221 (1991), we conclude the district court properly held Bradley is not disabled under the Nebraska statute.

Accordingly, we reverse in part, affirm in part, and remand to the district court to proceed with the business justification stage of this disparate impact case. *See Wards Cove*, 490 U.S. at 658-61.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA

LANGSTON BRADLEY, Plaintiff, and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff Intervenor, vs. PIZZACO OF NEBRASKA, INC., d/b/a DOMINO'S PIZZA and COMINO'S [sic] PIZZA, INC., Defendants.	)	CV 86-0-753 FINDINGS OF FACT

OFFICIAL
TRANSCRIPT OF PROCEEDINGS

BEFORE: THE HONORABLE WILLIAM G. CAMBRIDGE,
District Judge,
Omaha, Nebraska,
May 26, 1989

APPEARANCES:

ROBERT V. BROOM
MARY P. CLARKSON for the Plaintiff
Langston Bradley

GLENN F. YOUNGER
J. BENEDICT GARCIA for the
Plaintiff Intervenor

SOREN S. JENSEN
J. RUSSELL DERR for the Defendants

(p. 1) May 26, 1989
3:48 p.m.

(IN OPEN COURT)

THE COURT: Please be seated. The Court now makes the following findings in this case:

1. The Plaintiff Langston Bradley is a black male who resides in the City of Omaha, Douglas County, Nebraska.

2. The Plaintiff Langston Bradley suffers from pseudofolliculitis barbae, hereinafter referred to as PFB.

3. PFB is a medically established chronic facial skin disorder which is caused by sharp tips of recently shaved facial hair penetrating the skin and causing an inflammatory reaction such as painful papules, pustules, keloids and lesions which can result in scarring and other facial disfigurement. This condition is a condition which affects black males.

4. Defendant Pizzaco of Nebraska doing business as Domino's Pizza, hereinafter called Pizzaco, is a Nebraska corporation and at all pertinent times hereto operated a pizza bakery and carry-out business under the trade name Domino's Pizza, pursuant to the terms of a franchise agreement with Defendant Domino's Pizza, Inc., hereinafter referred to as Domino's. Domino's is a Michigan corporation doing business in Nebraska.

5. This Court's jurisdiction is invoked pursuant to 28 USC 1343(3) and (4), that is arabic three and four, and (p. 2) 42 U.S.C. 2000(e)-5(f) and the pendant jurisdiction

of this Court regarding state claims. This action is authorized pursuant to Title VII (42 U.S.C. 2000(e)) and pursuant to Nebraska Revised Statutes Section 20-148 and 48-1101 et seq. of the Nebraska Revised Statutes.

6. There is independent jurisdiction to maintain an action against Defendant Domino's Pizza, Inc. First, I find that there is a substantial identity of interest between the two defendants Pizzaco and Domino's. The no beard policy by Pizzaco was in fact the policy of Domino's Pizza which Pizzaco was required to adopt under the terms of the franchise agreement with Domino's. Secondly, Domino's Pizza had actual notice of the charge of discrimination and actively participated in the legal proceedings.

7. Plaintiff Intervenor Equal Employment Opportunity Commission moved to intervene in this action on September 8, 1987, and this Court granted said motion on October 9, 1987. The EEOC is seeking to enjoin further implementation of the no beard policy nationally unless an exception is provided for medical reasons.

8. Defendant Pizzco [sic] was required by its franchise agreement to establish a no beard policy which was in effect on September 17, 1984. This policy was in effect for all employees of Pizzaco and of Domino's regardless of race. There is no evidence that this policy was applied in any way (p. 3) but an equal manner among all employees and applicants.

9. On or about September 4, 1984, Pizzaco hired Bradley, the Plaintiff, as a delivery person at its location at 29th and St. Mary's Avenue, Omaha, Nebraska, at the rate of $3.50 per hour plus tips and delivery charges

resulting in an anticipated gross income of $6.00 to $10.00 per hour.

10. Subsequent to his employment, Bradley was informed by agents and representatives of Pizzaco that he was required to conform with the no beard policy of Pizzaco.

11. Plaintiff Bradley advised the Defendant Pizzaco that he could not shave due to the fact tht [sic] he had PFB, and that he would supply to the Defendant Pizzaco medical verification of his condition.

12. Bradley was terminated from his employment with Pizzaco on or about September 17, 1984 for failure to comply with the no beard policy of Pizzaco. The grooming policy of Pizzaco was enacted pusuant [sic] to the required terms and conditions of the franchise agreement with Defendant Domino's, and said required terms and conditions of the franchise agreement are included in all franchise agreements between Domino's and its franchisees throughout the United States.

13. On February 5, 1985, Bradley filed a timely charge with the Omaha Human Relations Department and the Equal Employment Opportunity Commission against Pizzaco. No (p. 4) such filing was made against Defendant Domino's, but due to the prior holding or finding of the Court with respect to the matter of the identity of the interests, the fact that no such filing was made is of no consequence. This action was commenced on September 4, 1986 pursuant to notification of the Plaintiff by the EEOC issued on or about June 6, 1986 that Bradley had a right to institute a civil action in the United States District Court. This action was timely filed as to

Pizzaco within 90 days of the receipt of said notice as provided by Title VII of the Civil Rights Act of 1964.

14. Bradley has appeared clean shaven on numerous occasions since the filing of this action. The evidence indicates that Bradley was clean shaven throughout his employment at First Data Resources. Therefore despite the fact that Bradley suffers from PFB, it appears that he can appear clean shaven.

15. Despite evidence that PFB afflicts a number of black males, the Court is persuaded by the expert testimony that sufferers of PFB may induce remission by growing a beard one quarter inch in length, by using a depilatory, by using special shaving instruments and other beard therapy which will control if not cure the problem for sufferers. The Court finds that a person may deliberately induce the condition by resuming shaving in a standard manner. The Court finds that there are alternative methods available and there were (p. 5) alternative methods available to the Plaintiff to appear clean shaven.

16. Since the Court finds that Bradley is able to shave, the Court also finds that he is not disabled as defined by Nebraska Revised Statute 48-1102 (a). The Court further determines that since Bradley is not disabled within the meaning of the statute, no discriminatory acts were taken against him on the basis of his alleged disability.

17. There is no evidence before the Court that any other black male employees of either Pizzaco or of Domino's or any black male applicants for employment at either Pizzaco or Domino's were denied employment or

terminated employment on the basis of the no beard policy.

18. Plaintiff Bradley and the EEOC have failed to establish that there is a disparate impact on black males due to the no beard policy of Pizzaco and Domino's.

It was incumbent upon the Plaintiff and the Intervenor to show that the no beard rule, which is a facially neutral rule, disproportionately excluded from employment members of the Plaintiff's group, and it was incumbent upon them not only to show that disproportionate impact but it was also incumbent upon them to show that it is an unjustified disproportionate impact.

The only statistics presented to the Court with respect to the sample with respect to those suffering from PFB (p. 6) were the studies referred to by Dr. Alexander, and the Court finds that those samples are small enough in character that the Court cannot rely upon them. The Court does find that they establish that blacks do suffer from PFB in a greater proportion than whites do, but I don't feel that you can rely upon them to establish the percentages contended for by the Plaintiff and the Intervenor.

It was incumbent upon the Plaintiff and the Intervenor in this case in order to make a prima facie case to define the labor market involved in this dispute to include only persons with undisputed qualifications for the job and also to define that labor market with respect to the geographical area surrounding the place of employment. That was done with respect to the labor market in the Omaha metropolitan area, Douglas County

and Sarpy County, but no labor market was defined with respect to any of the other operations of Domino's Pizza.

The testimony that was offered through the Plaintiff's and Intervenor's witness Bloch was in effect testimony that based upon the studies, the Alexander studies, he could then give an opinion as to the effect the percentages as determined by those studies, would have upon the employment of blacks for Domino's Pizza, and I didn't allow that testimony and I specifically didn't allow it for the reason that I didn't feel that there had been sufficient foundation to support such an opinion. It would have presumed that the same – and does (p. 7) presume, if you equate it in that manner, that the same number of blacks and whites that were involved in the study are going to exist in the labor markets of Domino's Pizza, and I don't feel that simply because Domino's Pizza does business throughout the nation that you can therefore simply take national statistics and say, "Well, these apply to Domino's Pizza." I think that the labor market of Domino's Pizza, in order for anyone to prove disparate impact in a case such as this, that labor or those labor markets must be defined.

I didn't allow Mr. Bloch to render his opinion with respect to the impact that the Alexander studies would have on the employment of blacks for Domino's Pizza, as I have indicated, on the basis that when asked what information he relied upon in making the analysis to that effect, he stated in effect, number one, that he had assumed and relied upon information from Mr. Black's deposition that there were some 100,000 drivers employed by Domino's nationally; and two, he relied upon an EEO-1 form of Domino's, which I can't tell from

the record applies to what operations of Domino's. It obviously doesn't apply to all operations of Domino's because the figures are not consistent with the evidence as to the total amount of employees of Domino's. They are significantly smaller on the EEO-1 form, and may be representative of a particular location of Ann Arbor, Michigan, but certainly don't apply throughout their system, throughout the nation.

(p. 8) Then his further assumption was, the number three assumption was that in effect that 22 per cent of the blacks with PFB are required to wear beards. I have already commented on the fact that I think the sample which was offered in proof of that is too small, and of course there is evidence to the effect that those blacks who are required to wear beards are not required to wear them all the time.

He further stated that in connection with his analysis, he asked how many blacks would he expect Domino's to employ if Domino's had no beard restriction and what would be the variations of that in terms of statistical deviation. Then the next question he said that he analyzed was how many black [sic] would he expect Domino's to employ with the beard restriction, and in support of his opinion then, which I didn't allow, he went on to base that opinion on the number of people in the U. S. who would be interested in jobs with Domino's, what percentage of those would be black, which he referred to as "the availability percentage," and what he came up with then for his assumption to arrive at the opinion which he was not allowed to give was that based upon the U. S. Census, five to six per cent of driver sales persons or workers were black, and in the civilian labor

force ten to eleven per cent were black, and I find that those types of statistics are not sufficient to prove a case of (p. 9) disparate impact under the facts that circumstances of this case, that is to say that to jump from the surveys that were run by Dr. Alexander or made by him and transpose those figures to the national scene without taking into account the labor market of Domino's simply would not be fair and is not authorized by law.

My understanding of the law is that, as I said, the labor market must be defined to include only those persons with undisputed qualifications for the job and must further be defined to include only those persons in the geographical area surrounding the place of employment.

Moreover, after the racial composition of the labor market has been determined, it must then be compared with the racial composition of those actually hired or within the employ of the employer, in this case Domino's, and that comparison between the racial composition of the labor market and the racial composition of those hired should be accomplished by proper statistical methods, and I find that those methods were not presented to this Court in this case.

I rely upon the case of Hazelwood School District versus the United States, 433 US 299, a 1977 case, for the statistical methods required.

It is my understanding that Hazelwood was a case involving disparate treatment, but it is my understanding that the same basic requirements with respect to statistical (p. 10) evidence are the same for the disparate impact cases. The labor market for the jobs at issue must be defined. Then the proportion of a particular group among

those in the labor market and the proportion among those who possess the disputed qualification must be established. Next, the two proportions must be compared by statistical means to determine the probability that any difference between them resulted solely by chance, and finally, any statistical significant difference must be examined to determine whether it is large enough to be practically significant.

19. As a result of the foregoing, I find that the termination of Plaintiff by Pizzaco on or about September 17, 1984, was not the result of discrimination against the Plaintiff based on his race. I further find that the Plaintiff has not been discriminated against on the basis of his race in violation of Title VII, that is, 42 U.S.C.2000 (e)-2.

I further find that the Defendants Pizzaco and Domino's have not engaged in a discriminatory act in violation of the Civil Rights Act of 1986, that is, 42 U.S.C. 1981.

I further find that the Defendants have not deprived the Plaintiff of rights, privileges and immunities guaranteed and protected by the laws of the State of Nebraska.

I further find that the Defendants have not deprived the Plaintiff based on his race of his rights as secured by 21-148 Nebraska Revised Statutes as Amended.

(p. 11) I further find that the Defendants have not deprived Plaintiff of rights, privileges and immunities and protected by the laws of the State of Nebraska, special [sic] the Nebraska Fair Employment Practices Act.

I further find that this Court therefore should not issue a nation-wide or local permanent injunction, restraining and enjoining the defendants from enforcing

or otherwise utilizing in their employment decisions the no beard policy as a basis for refusal to hire or employ black males who suffer from the condition of PFB.

I further find that the Plaintiff has not been damaged by the Defendants.

I might on the record state that this does not mean that I don't have sympathy with the Plaintiff and with those that suffer from this condition. I do have that sympathy, but the law is the law and I have to be governed by the law.

I therefore have no alternative but to find and order that the Complaint of the Plaintiff Langston Bradley and the Petition of Intervention of the Equal Employment Opportunity Commission should be and are therefore dismissed, and the Clerk is instructed to enter a judgment accordingly with the costs taxed to the Plaintiff and Intervenor.

I want to further state that I reserve the right to supplement my findings in this case in the event there is (p. 12) an appeal, and now I would like to ask counsel for any suggestions they might have with respect to the findings that I have just made, not with respect, of course, to taking issue with them, but any suggestions they might have with respect to supplementation of those findings or modification of them.

And as I have said, I am not asking you to agree with them. I know that Plaintiff and Intervenor obviously won't agree with them, and I am sure that I have made certain findings here that the Defendants won't agree with, but I am not asking you whether or not you agree

with them at this time now, I am simply asking for any clarifications, in effect, that you might suggest with respect to the findings that I have just made.

Does the Plaintiff have any such suggestions?

MR. BROOM: None, your Honor.

THE COURT: Intervenor?

MR. YOUNGER: None.

THE COURT: The Defendants?

MR. JENSEN: Not at this time, your Honor. If we would review our notes and think of something in the near future we would mail them to you and send copies to the other parties.

THE COURT: All right. Is there anything further that should come before the Court in connection with this matter?

(p. 13) MR. BROOM: Not a thing, your Honor. On behalf of both the Plaintiff-Intervenor and the Plaintiff, we would like to have leave of Court, if we could, to substitute slides 1 through 23 of Exhibit 16 so that the originals would be returned to Dr. Alexander. It is my understanding that Defendant Counsel has no objection. Sub-part Bradley 1, 2, 3 and 4 would be actual slides that were introduced, and we would ask leave to substitute slides 1 through 23, copies for the originals.

THE COURT: And you have no objection to that?

MR. JENSEN: No objection, your Honor.

THE COURT: All right, leave is granted for such substitution.

Is there anything further?

MR. BROOM: Nothing further.

MR. JENSEN: Thank you, your Honor.

THE COURT: Court is adjourned.

(COURT ADJOURNED.)
4:24 p.m.

(p. 14) REPORTER'S CERTIFICATE

I, Peggy Casper, Certified Shorthand Reporter and an Official Court Reporter for the United States District Court for the District of Nebraska, appointed pursuant to the provisions of Title 28, United States Code, Section 653, do hereby certify that the foregoing is a full, true and correct transcript of the Court's ruling and findings of fact in the within-entitled and numbered cause on May 26, 1989, and I do further certify that the foregoing transcript has been prepared by me or under my direction.

Dated this 12th day of June, 1989.

PEGGY CASPER, C.S.R.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

LANGSTON BRADLEY and Plaintiff	)	CV86-0-753
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Intervenor	)	JUDGMENT (Filed May 31, 1989)
vs.	)	
PIZZACO OF NEBRASKA, INC, d/b/a DOMINO'S PIZZA and DOMINO'S PIZZA, INC. Defendants	)	

This action came on for trial before the Court, Honorable William G. Cambridge, Judge, presiding.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's ruling read into the record at the close of the case; Judgment is hereby entered in favor of the defendants, PIZZACO OF NEBRASKA, INC., d/b/a DOMINO'S PIZZA and DOMINO's PIZZA, INC., that the case is dismissed on the merits with prejudice, and that the defendants recover from the Plaintiff Intervenor, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, taxable costs of this action.

Dated at Omaha, Nebraska this 31st day of May, 1989.

WILLIAM L. OLSON
CLERK OF THE COURT

By Gary D. McFarland
GARY D. MCFARLAND
DEPUTY CLERK

42 USC 2000e-2 provides:

§ 2000e-2. Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer –

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Employment agency practices

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

Labor organization practices

(c) It shall be an unlawful employment practice for a labor organization –

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Training programs

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

Members of Communist Party or Communist-action or Communist-front organizations

(f) As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any

action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

National security

(g) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if –

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

Businesses or enterprises extending preferential treatment to Indians

(i) Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which

a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

Preferential treatment not to be granted on account of existing number or percentage imbalance

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Pub.L. 88-352, Title VII, § 703, July 2, 1964, 78 Stat. 255; Pub.L. 92-261, § 8(a), (b), Mar. 24, 1972, 86 Stat. 109.

No. 91-640

In the Supreme Court of the United States

OCTOBER TERM, 1991

PIZZACO OF NEBRASKA, INC., d/b/a DOMINOS PIZZA ET AL., PETITIONERS

v.

LANGSTON BRADLEY AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether a prima facie case of an employment practice's disparate impact can be made by unrebutted statistical evidence of the disproportionate effect of the employer's policy on black males, without reference to the bottom-line effect of the practice in the particular employer's work force.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-640

PIZZACO OF NEBRASKA, INC., d/b/a DOMINOS PIZZA ET AL., PETITIONERS

v.

LANGSTON BRADLEY AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. a1-a6) is reported at 926 F.2d 714. The opinion of the court of appeals on denial of rehearing (Pet. App. a8-a15) is reported at 939 F.2d 610. The district court's oral opinion (Pet. App. a16-a28) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1991. A petition for rehearing with a suggestion for rehearing en banc was denied on

July 24, 1991 (Pet. App. a7). The petition for a writ of certiorari was filed on October 15, 1991. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are companies in the business of producing and selling pizzas to the public, mostly via home delivery. Pet. App. a17. Petitioner Pizzaco of Nebraska, Inc., does business as "Domino's Pizza," and is a franchise of petitioner Domino's Pizza, Inc. *Ibid.* Petitioners require as a condition of employment that all employees adhere to a no-beard policy. *Id.* at a18. Respondent Langston Bradley was employed by petitioner Pizzaco as a driver from September 4 to 17, 1984, when he was discharged for "failure to comply with the no beard policy of Pizzaco." *Id.* at a19.

Bradley is a black male who has suffered from pseudofolliculitis barbae (PFB) since he began shaving over 20 years ago. Pet. App. a17. PFB is a condition "caused by sharp tips of recently shaved facial hair penetrating the skin and causing an inflammatory reaction." *Ibid.* PFB may cause permanent scarring, hyperpigmentation, and disfigurement. C.A. App. 183-186. Dr. Melvin Alexander, respondents' medical expert at trial, testified that 45% of black males whom he has studied or treated have diagnosable cases of PFB, and that "half of that group had it a level that we would consider moderate at least." C.A. App. 198. Shaving abstinence is indicated as a treatment at the moderate to severe levels. C.A. App. 182-183. Thus, between 20% percent and 25% of black males Dr. Alexander has observed have cases of PFB of such severity that they suffer moderate to severe shaving difficulty, and "shaving abstinence

would be a strong consideration * * * in their therapy." C.A. App. 198; see also *id.* at 213, 429-431. In a proffer that the court of appeals held should have been admitted into evidence,[1] Dr. Alexander stated that 25% of the general population of black men have cases of PFB sufficiently severe that shaving abstinence would be recommended. C.A. App. 229.

White males, by contrast, "can be expected to rarely experience shaving difficulties from *any* skin disorder and are unlikely to abstain from shaving for therapeutic reasons." C.A. App. 431. Petitioners' own medical expert testified that, in his experience, every case of PFB that was sufficiently severe to require shaving abstinence as a treatment involved black men. C.A. App. 329.

2. Respondent Langston Bradley filed this suit, alleging that petitioners' policy has a disparate impact on the employment opportunities of black males in violation of Title VII of the Civil Rights Act of 1964. The district court subsequently granted the Equal Employment Opportunity Commission's motion to intervene. The Commission's complaint alleged that petitioners' no-beard policy violated Title VII, and sought backpay and other make-whole relief for Bradley and other black males adversely affected by the policy, as well as an injunction barring further en-

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[1] Respondents sought to elicit testimony from Dr. Alexander as to his opinion of the prevalence of PFB in the general population, but the district court refused to admit the evidence based on a lack of foundation. C.A. App. 228-229. The court of appeals held that the district court abused its discretion in failing to admit this evidence, because "[t]he record and [Dr. Alexander's] resume show that he has extensive experience in the field of dermatology, and has conducted studies, written articles, and lectured on the topic of PFB." Pet. App. a11.

forcement of the no-beard policy unless a medical exception for sufferers of PFB was provided.

After trial, the district court rejected respondents' disparate impact claim. Pet. App. a16-a28. The court found that Bradley "can appear clean shaven," and that, in general, "sufferers of PFB may induce remission" by use of methods "which will control if not cure the problem for sufferers." *Id.* at a20. Noting that there was no evidence of any other black male employees or applicants who were affected by the no-beard policy, the court concluded that petitioners had "failed to establish that there is a disparate impact on black males due to the no beard policy of Pizzaco and Domino's." *Id.* at a21.

In analyzing plaintiffs' statistical evidence, the district court agreed that PFB has a highly disproportionate effect on black males. Pet. App. a21. The court concluded, however, that respondents' failure "to define the labor market involved in this dispute" to include only qualified persons in the relevant geographic area undermined any probative value that respondents' statistics might otherwise have had. *Ibid.* The district court also required that the properly-defined labor market "be compared with the racial composition of those actually hired or within the employ of the employer," *id.* at a24, before a prima facie case could be made.

3. The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. a8-a15. The court of appeals reversed the district court's conclusion that respondents had not shown the disparate impact of the no-beard policy, finding that "[t]hrough expert medical testimony and studies, the EEOC demonstrated Domino's policy necessarily excludes black males from the company's work force at a substan-

tially higher rate than white males." *Id.* at a10. The court accepted the conclusion of respondents' expert that "approximately twenty-five percent of all black males cannot shave because of PFB," and that this statistical evidence was "representative of PFB's prevalence in, and impact on, the general black male population." *Id.* at a11-a12.

The court rejected the district court's conclusion that the respondents were required to define a qualified labor market for Domino's Pizza and to show the prevalence of PFB in that specific market, because "the disqualifying racial condition affects the black males without regard to geographical, cultural, educational, or socioeconomic considerations." Pet. App. a12 (citing *Dothard* v. *Rawlinson*, 433 U.S. 321, 330 (1977)). Nor were respondents required to adduce statistical evidence comparing petitioners' work force with the general labor market, because "a case can be made under Title VII by proving a specific hiring practice has a disparate impact, 'notwithstanding the bottom-line racial balance in [the employer's] workforce.' " Pet. App. a13.

Finally, the court of appeals affirmed the district court's factual finding that respondent Bradley is able to shave, based upon testimony that "Bradley has a mild case of PFB, and that at his next job, Bradley always appeared clean-shaven." Pet. App. a14. The court of appeals remanded the case with instructions for the district court "to proceed with the business justification stage of this disparate impact case." *Id.* at a15.

ARGUMENT

Petitioners claim that the court of appeals' analysis is "in direct conflict" with this Court's decision in *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989). Pet. 6. But it is petitioners' theory of this case that is inconsistent with *Wards Cove*, as well as with several other of this Court's cases. Under well-established precedent, petitioners' no-beard policy, which has the effect of categorically excluding from job eligibility a high percentage of all black men and virtually no white men, is prima facie violative of Title VII.

1. Respondents established through medical and statistical evidence that the no-beard policy disproportionately affects black men, who as a class have a genetic predisposition to PFB that is not shared by white men. Neither court below disputed that such a showing had been made, and petitioners concede as much. Pet. 6, 10. It is true that respondents did not show that there was "a disproportion of black males in Dominos work force as compared to the proportion of black males in the labor market." Pet. 7. As the court of appeals held, however, petitioners' suggestion that such a showing was required is off the mark.

The notion that a disparate impact plaintiff must always demonstrate a "bottom line" effect on the employer's work force is directly contrary to this Court's decision in *Connecticut* v. *Teal*, 457 U.S. 440 (1982). In *Teal*, the Court held that the disparate impact of a specific job qualification may be shown in isolation even if, looked at as a whole, the entire selection process does not have a "bottom line" impact on the group; the Court recently reaffirmed this holding in *Wards Cove*, 490 U.S. at 653 n.8. Petitioners nonetheless rely (Pet. 8-9) on a different aspect of *Wards*

Cove, where the Court held that a comparison of an employer's work force with the relevant labor market can demonstrate an employment practice's disparate impact only if the bottom line disparity is causally linked to the specific practice under challenge. 490 U.S. at 656-657.

Petitioners' treatment of this portion of *Wards Cove* as establishing that a "bottom line" impact on an employer's workforce is a necessary predicate to any disparate impact claim cannot be reconciled with *Teal*. Nor can it be reconciled with *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971)—a case that petitioners simply ignore—in which imposition of a high school diploma requirement was held prima facie violative of Title VII solely because it disqualified blacks from job eligibility at a much higher rate than whites. Finally, petitioners' claim is directly contrary to *Dothard* v. *Rawlinson*, 433 U.S. 321, 328-331 (1977), in which this Court held that a job qualification that had the effect of excluding women from job consideration at a far greater rate than men was a prima facie violation of Title VII, even though the plaintiffs there had not shown that the practice at issue had any effect on the applicant pool. Indeed, as in *Dothard*, the likely effect of the challenged policy is that "otherwise qualified people might be discouraged from applying," *id.* at 330; no refutation of this likely effect was offered.[2]

In this case, respondents showed at trial that the employment practice at issue categorically excluded

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[2] Petitioners' unsupported assertion that *Dothard* does not survive *Wards Cove* is incorrect. In fact, *Wards Cove* specifically referred to *Dothard*, and noted that Title VII plaintiffs can "rest their prima facie cases on [general population] statistics" if those statistics accurately reflect the pool of qualified job applicants. 490 U.S. at 651 n.6.

from the eligible job pool 25% of all black men. Under *Wards Cove*, 490 U.S. at 656-657, in order to make out a prima facie case, respondents were required to show that a specific employment practice (here, petitioners' no-beard policy) caused a specific impact on the employer's work force (here, by excluding from job eligibility one quarter of all black men). Nothing more was necessary.

2. Petitioners also complain (Pet. 7-9) that the statistical and medical evidence was not sufficiently tied to the qualified job applicant pool. This argument is sufficiently answered by *Dothard*, where the Court stated that reliance on general population statistics is sufficient if "there [is] no reason to suppose" that the statistics at issue "differ markedly from those of the national population." 433 U.S. at 330. In this case, there is absolutely no reason to think—and petitioners have offered no reason to think, see Pet. App. a4, a12—that the general population in petitioners' geographic area is at all different from the national averages; indeed, petitioner Domino's Pizza, Inc. is a national employer. Petitioners cannot dispute the probative value of general population data on the basis that the pool of potential qualified applicants does not correspond with the general population because the jobs at issue in this case require no special qualifications. See *Hazelwood School Dist.* v. *United States*, 433 U.S. 299, 308 n.13 (1977); *Teamsters* v. *United States*, 431 U.S. 324 (1977). As in *Dothard*, if petitioners "discern[ed] fallacies or deficiencies in the data offered," they were "free to adduce countervailing evidence of [their] own." *Dothard*, 433 U.S. at 331.

3. Petitioners argue that it was necessary for the respondents to show that "at least one [person] had suffered adverse action because of the rule." Pet. 7.

It is true that there was no actual victim of the policy before the court because respondent Bradley was able to shave as a factual matter. Petitioners' argument that this doomed the disparate impact claim is incorrect for several reasons.

First, petitioners cite no authority for the proposition that a disparate impact claim requires a showing that a specific individual was harmed by the policy at issue. To the contrary, it cannot be doubted that "statistical proof can alone make out a prima facie case." *Wards Cove*, 490 U.S. at 650. See also *Teamsters* v. *United States*, 431 U.S. at 339. As the Court stated in *Hazelwood School District*, 433 U.S. at 307-308, "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." The court of appeals pointed out the obvious reason, which is that "a discriminatory work policy might distort the job applicant pool by discouraging otherwise qualified workers from applying." Pet. App. a13.[3] Because the evidence that was offered so clearly demonstrated disparate impact, respondents had no need to seek other types of evidence. *Dothard*, 433 U.S. at 331.

Second, a blanket rule of the sort petitioners propose—that, no matter how strong the statistical evidence, proof of disparate impact must always in-

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[3] Petitioners argue that there "was no evidence of any chilling effect offered." Pet. 10. This Court has not, however, required any such evidence, but has simply relied on the logical probability that "otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory." *Dothard*, 433 U.S. at 330. Petitioners offer no basis for departing from this principle.

clude identification of an individual affected by the challenged practice—would unduly harm the Commission's enforcement efforts. The Commission is empowered to seek injunctive relief to vindicate the public interest in eradicating employment discrimination, even in the absence of a co-plaintiff who has been specifically harmed. *EEOC* v. *United Parcel Service*, 860 F.2d 372 (10th Cir. 1988). The Commission routinely investigates cases of possible employment discrimination where the charging party is a member of the Commission rather than a private party. § 706(b), 42 U.S.C. 2000e-5(b); see also 29 C.F.R. 1602.7 (detailing certain reporting forms that some employers must file with the Commission). The Commission's investigation of a private charge may reveal a discriminatory practice, but may also show the charging party was not a victim of the practice. In such cases, the Commission can sue to end the practice while declining to seek relief for the charging party. In any of these situations the Commission may bring an action against an employer as the sole plaintiff.

In such cases, whether there is an identifiable individual who has been victimized by the challenged policy is a question of relief, and not one of liability. If no specific victims can be identified in a pattern-and-practice suit, then relief may and should properly be limited to enjoining the discriminatory practice.[4]

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[4] We note in this context that petitioners' contention (Pet. 9) that the Commission is seeking "a national and broad reaching injunction * * * which would affect more than 100,000 employees" is misleading. As the court of appeals observed, the Commission "seeks an injunction requiring Domino's to recognize an exception to the policy for black men who medically are unable to shave, *but does not dispute that Domino's is otherwise free to enforce its policy.*" Pet. App. a3 (emphasis added). The injunction the EEOC is seeking will af-

4. Petitioners' fundamental point is that no inference of disparate impact can be drawn from respondents' unchallenged statistical proof. As we have shown, however, under *Dothard*, 433 U.S. at 328-331, and *Teal*, 457 U.S. at 450, the categorical exclusion of a high percentage of the otherwise qualified labor pool establishes a prima facie case of disparate impact even if the policy at issue does not have a bottom-line effect on the employer's work force. Putting that aside, however, each court presented with statistical evidence similar to the evidence in this case—that, as a result of PFB, no-beard policies disproportionately affect black men—has agreed that the evidence demonstrated a disparate impact. *Richardson* v. *Quik Trip Corp.*, 591 F. Supp. 1151 (S.D. Iowa 1984) (finding disparate impact without analysis of actual effects on employer's work force); *EEOC* v. *Trailways, Inc.*, 530 F. Supp. 54 (D. Colo. 1981); *Woods* v. *Safeway Stores, Inc.*, 420 F. Supp. 35 (E.D. Va. 1976) (although policy had disparate impact, employer justified its business purpose), aff'd, 579 F.2d 43 (4th Cir. 1978), cert. denied, 440 U.S. 930 (1979).[5] Petitioners do not dispute this, but nonetheless urge that this Court grant review to correct the court of appeals' perceived error. To the contrary, this Court's review is unwarranted in the absence of any disagreement among the lower courts on the applicability of Title VII to no-beard policies.

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fect only employees and applicants who suffer from PFB and are unable to shave as a result.

[5] The only exception is *EEOC* v. *Greyhound Lines, Inc.*, 635 F.2d 188 (3d Cir. 1980), a decision premised on the bottom-line theory this Court later rejected in *Teal*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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